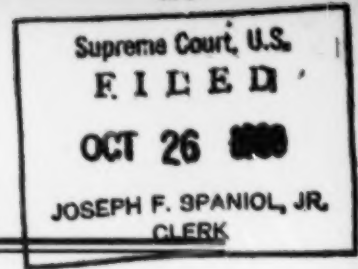


89-733 (1)



No.

IN THE

Supreme Court of the United States

ANDREW TOTH, *et al.*,

Petitioners,

vs.

USX CORPORATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether this Court in *Kaiser Steel Corporation v. Mullins* abolished the common-law exceptions to the illegality defense in the law of contracts and thereby meant to create a new federal "common law" that is opposed to the traditional law of contracts?

PARTIES TO THIS PROCEEDING

The parties in the court below were twenty-two USX employees, Andrew Toth, Jack Eckman, Harry Piasecki, Len Hackett, Tim Trant, Robert Howell, Edward Sadlowski, Ernie Clifford, Don Dalena, Jack Fabry, John Foley, Robert Kutch, George Myers, Chuck Canelakes, C.T. Armstrong, Richard Adylotte, Regis Fallon, Donald Walters, Kenneth Shorts, Henry Cano, Victor Espinosa, and William Greenlee; and USX Corporation.

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**PETITION FOR WRIT OF CERTIORARI TO
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JURISDICTION

The judgment of the Court of Appeals was made and entered on August 25, 1989. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1001-1381, and the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. Sections 185-186.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 883 F.2d 1297 (CA7 1989). It is reprinted in the Appendix ("App.") at pages 1a-20a. The opinion of the District Court is reported at 693 F. Supp. 693; it is reprinted at App. 1b-20b.

STATEMENT OF CASE

The petitioners are 22 former employees of USX Corporation ("USX") who joined the staff of the United Steel Workers of America ("Union"). They seek to enforce a special USX leave-of-absence policy that has the effect of granting each of them pension service credit for the time they spent on the union staff after they left active employment with USX. Without such a special policy, the petitioners would not have the normal company pensions that other USX employees receive and would lose all or nearly all of the value of their past service credit when they joined the Union staff.

While the leave-of-absence policy is a standard industry practice, USX was one of the few major steel-industry employers that did not have such a practice. It issued such a policy only in October 1984, and even then, USX granted pension service credit to only six of the 40 or so former USX employees who were on the Union staff. Furthermore, USX kept the policy a secret from the other Union staff members, including petitioners.

When Andrew Toth and the other petitioners learned of the policy in early 1987, they applied to USX for the pensions to which they were entitled. USX rescinded the policy and claimed that it was illegal under Section 302 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186, which prohibits any payment of money or any other thing of value from an employer to an employee representative. However, USX said that it would continue paying pensions to the six union staff members who had secretly begun to receive them in 1984.

On March 12, 1988, Toth and the other Union staff members filed suit against USX in the U.S. District Court for the Northern District of Illinois and sought to enforce the leave-of-absence policy as a pension plan or benefit under the Employee Retirement Income Security Act (ERISA). USX filed a motion to dismiss the ERISA action, raising the defense that the payments sought by Toth and the others were illegal payments under Section 302 of the LMRA. USX relied chiefly on the decision of the Third Circuit in *Trailways Lines, Inc. v. Trailways, Inc., Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (CA 3), cert. denied, 107 S.Ct. 400 (1986), which held that a similar type of policy was illegal under Section 302 of the LMRA.

Toth and the other Union staff members replied to the motion to dismiss with an additional statement of facts. These facts included the following: USX had issued the leave-of-absence policy to provide pensions to certain Union staff members who had negotiated a concessionary collective bargaining agreement in Fairfield, Alabama in December 1983. While USX paid pensions under this policy to only six employees, all of them in the Alabama area, the policy was written like the standard industry policy for union staff members (literally dozens of major corporations have such policies for employees who join the union staff). However, the USX policy, unlike the standard policy, was not disclosed, not placed in a collective bargaining agreement, and not brought to the attention of Toth and the other Union staff members.

Based on these facts, Toth and the others argued as follows:

First, the leave-of-absence policy is a lawful payment and not barred by Section 302 of the LMRA. Furthermore, even if USX had intended the policy to be used secretly and selectively, contrary to its terms, the policy was now uncovered, and was lawful on its face, and lawful as applied to the Toth group, who had not taken part in any illegal scheme of any kind.

Second, even if the Court held that the policy were illegal, because it was not negotiated in the proper manner by USX, the wrongdoer, USX, could not raise the illegality defense against a wholly innocent party. The parties were "not *in pari delicto*," or at equal fault, and since USX was wholly guilty and the Toth staff members were wholly innocent, USX could not raise its own misconduct as a defense to liability.

The U.S. District Court granted USX's motion to dismiss on the ground that all such policies were illegal under Section 302, as declared by the Third Circuit in *Trailways*. The District Court also held that the principle of "not *in pari delicto*" on which the Toth staff members relied had been abolished by this Court in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), although adding a cursory remark that it saw no reason to apply the principle here anyway.

The Toth group then appealed. The U.S. Court of Appeals for the Seventh Circuit upheld the lower court's dismissal of the case, but on quite different grounds. The Seventh Circuit rejected the Third Circuit's decision in *Trailways* and held that the typical leave-of-absence policy that grants pension credit to Union staff is lawful under Section 302, in normal circumstances. However, the Seventh Circuit held that while the policy is normally lawful, the policy in this case was not lawful, because it was negotiated in secret and not set out openly in a collective bargaining agreement or with the proper full disclosure. The Seventh Circuit also rejected the petitioners' argument that the policy here could still be enforced because the respective parties were "not *in pari delicto*" or at equal fault. It agreed with the lower court

that in *Kaiser* this Court had abolished the various common-law exceptions to the illegality defense and had apparently created a new federal common law that federal courts will *never* enforce illegal contracts under any circumstances. Again, the Seventh Circuit, like the lower court, added a passing remark that it would not apply the principle anyway, with the somewhat inexplicable comment that this case was "like" *Kaiser* because in both cases the plaintiffs were "innocent."

REASON FOR GRANTING WRIT

1. This case raises an important issue of federal law which *only* this Court can resolve: namely, whether this Court in *Kaiser Steel Corporation v. Mullins* abolished the common-law exceptions to the illegality defense in the law of contracts and thereby meant to create a new federal "common law" that is opposed to the traditional law of contracts?

This is a very extraordinary case. The Seventh Circuit has held that in *Kaiser Steel Corporation v. Mullins*, *supra*, 455 U.S. 72, this Court meant to throw out a major portion of the law of contracts and replace it with a new federal "common law." Both the lower court and the Court of Appeals agreed that this Court held in *Kaiser* that federal courts may never enforce illegal contracts under any circumstances. The petitioners read *Kaiser* quite differently. It is true that in *Kaiser* this Court stated flatly that "courts will not enforce illegal contracts." *Id.* at 82 But in a footnote, this Court acknowledges implicitly that there are common-law exceptions to this rule, at least to the extent that the majority opinion cites with apparent approval "6 A Corbin on Contracts, § 1518-1531," which lists various common-law exceptions to the illegality defense, including the principle of "not *in pari delicto*." *Id.* at 82, n.7.

Obviously, the *Kaiser* decision is ambiguous, since two courts have held that it did abolish the principle of "not *in pari delicto*," in all cases and under all circumstances. This Court should grant the petition here if only to make sure that the lower courts realize that they have not been placed under a new federal common law and that they still have their equitable powers to do justice on a case-by-case basis under the traditional common-law exceptions to the illegality defense.

Until *Kaiser*, it had always been clear that federal courts could invoke in the proper circumstances the various common-law exceptions to the illegality defense, including the principle that the parties were "not *in pari delicto*" or at equal fault. E.g., *Gibbs & S. Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884); *In re Leasing Consultants Inc.* 592 F.2d 962, 969 (CA 5 1970); *Stamatiou v. U.S. Gypsum Co.*, 400 F. Supp. 431, 439 (N.D. Ill. 1975), *aff'd* 534 F.2d 330 (CA 7 1976). On the other hand, since the *Kaiser* decision in 1982, there have been no federal cases invoking these exceptions, although state courts have continuously and frequently invoked the doctrine of "not *in pari delicto*" in the same time. E.g., *Golberg v. Sanglier*, 639 P.2d 1347 (Wash. 1982).

While the Seventh Circuit said it would not apply the doctrine of "not *in pari delicto*" anyway, even if not abolished, it was a single cursory remark that this Court should ignore. For one thing, in applying the doctrine of "not *in pari delicto*," the courts must engage in a detailed weighing of the facts, which the Seventh Circuit opinion does not even remotely attempt to do. See Corbin, *supra*, §1534, at pp. 818-19. Indeed, the only reason the Seventh Circuit gives for not applying the doctrine is that this case is "like" the *Kaiser* case, in that the plaintiffs of both cases are "innocent." Obviously, the plaintiffs in these cases are *always* innocent, or relatively innocent, or the courts would never even apply the principle. The Seventh Circuit's remark is so inexplicable, so much of a non-sequitur, that it only underscores the

Seventh Circuit's main holding that the principle was abolished in *Kaiser* and need not be considered here at all.

There are two main reasons for letting the Toth group proceed with their argument that the parties in this particular case are "not *in pari delicto*" or equal fault. Or to put it another way, there are two strong reasons why public policy would not be served by letting USX raise the illegality defense:

First, Toth and the other staff members are wholly innocent, while USX has engaged in the most serious possible criminal misconduct. USX has not committed some technical violation of Section 302, depending on one's view of *Trailways* and other cases. Rather, USX has engaged in a scheme to bribe and corrupt certain Union staff. But it could engage in this scheme only by using Toth and the other staff members as pawns, that is, by creating a leave-of-absence policy that looked legal and seemed legal but would be only a cover for making secret payments to the six in Alabama and would never result in any service credit to Toth and the other staff.

Just as much as USX is criminally guilty here, the Toth staff members are wholly innocent. They did not take part in any illegal scheme, and indeed, they were the ones who uncovered it. Furthermore, the Seventh Circuit has now ruled, contrary to the Third Circuit in *Trailways*, that the policy which the Toth group seeks to enforce is normally legal and proper, if there is full disclosure of it and no unlawful purpose. Clearly, with respect to the Toth group, USX had no unlawful purpose. It was not seeking to bribe or improperly influence them. Of course, it would be outrageous to permit USX to pay off the six Union staff members in Alabama: this would be clearly an illegal payment under Section 302 and should not be enforced. However, *ordinarily*, and *normally* the service credit that the Toth group seeks to receive is lawful and appropriate, and is not an illegal windfall to them in any way. It simply puts the Toth group on the same footing as most other Union staff, and not only at the Steel Workers, but also at the Mine Workers, the Auto Workers, and many

other major unions. Since the Toth group is wholly innocent, there is absolutely no federal policy that would be violated by letting them receive the credit here.

Second, the policy should be enforced, as a sanction or financial penalty against USX. Indeed, it would be a mockery of federal law, especially Section 302, to let USX raise its own criminal conduct to get off the hook for a large civil liability. Right now, in Alabama, a federal grand jury is investigating USX's conduct. But even if USX is indicted and found guilty under Section 302, the *maximum* criminal penalty that USX faces is only \$15,000, 29 U.S.C. § 186(d). That is nothing but carfare to USX, one of the biggest corporations in the world. On the other hand, if the policy here is enforced, USX will be liable for up to \$1 to \$2 million in pensions it probably hoped that it would never have to pay.

In other words, if USX is found to be guilty of a criminal violation, there is no legal sanction that will offset the windfall which the Seventh Circuit has given it. The purpose of federal criminal law, including Section 302, should be to punish, i.e., to make wrongdoing as costly as possible. The Seventh Circuit and the District Court should be given the discretion to punish here, by barring USX from raising the illegality defense, and so this case should be remanded for a full evidentiary hearing on this issue.

This case is just the opposite of *Kaiser*. In *Kaiser*, the trustees of the UMW Pension Fund were suing to collect pension contributions that were required under an illegal "purchase-of-coal" clause, which had been negotiated in flat violation of federal antitrust and labor law. Under such a clause, the employer had to pay the UMW fund a certain amount not only for each ton of "union" coal produced but also for each ton of "non-union" coal. If the trustees could have enforced the clauses anyway, then the federal law would have become a dead letter. Applying the doctrine of not *in pari delicto* would have rewarded the guilty parties, if not

the pension fund itself, then at least the UMW which had negotiated the illegal clauses to benefit the fund.

The simple difference is that in *Kaiser*, the principle of "not *in pari delicto*" would have frustrated federal policy, whereas here, it would clearly promote it. By holding that *Kaiser* has abolished the principle altogether, the Seventh Circuit has deprived itself of the ability to do equity and promote the real federal policy at stake when special circumstances demand it.

The most alarming effect of the Seventh Circuit decision may be an increasing belief in the lower federal courts that there is a new "federal common law," that it supersedes the traditional law of contracts, and that sometimes, perversely, in the name of this new federal common law, even the most important policies and interests of the federal criminal law may be sacrificed. This Court should step in now to clear the confusion and remand the case for a full evidentiary hearing on the petitioners' argument that the parties are "not *in pari delicto*" or at equal fault.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1a
APPENDIX A
In the
United States Court of Appeals
For the Seventh Circuit

No. 88-2889

ANDREW TOTH, et al.,

Plaintiffs-Appellants,

v.

USX CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 2135—Nicholas J. Bua, Judge.

ARGUED APRIL 12, 1989—DECIDED AUGUST 25, 1989

Before WOOD, JR., CUDAHY, and KANNE, *Circuit Judges*.

CUDAHY, *Circuit Judge*. In this case we are asked to decide whether the defendant, USX Corporation ("USX"), may institute a leave policy, refuse all but six applications under the policy and then rescind the policy without formally consulting their workers' union (in this case, the United Steelworkers of America, AFL-CIO-CLC ("USWA", the "Union")) or notifying other potentially eligible claimants. Fifteen former USX employees who were technically eligible under the new leave policy sue for monetary and equitable relief under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*

USX argues that because its leave policy was illegal under the LMRA, the company did not violate ERISA by unilaterally revoking the policy. Plaintiffs, by contrast, argue that the leave policy did not violate the LMRA and that unilateral rescission was therefore unlawful under ERISA. They also assert that USX administered the policy in an arbitrary and discriminatory way—indeed, not even in accordance with the policy's own express terms (which the plaintiffs in any event viewed as discriminatory as well). Because the new leave of absence policy was allegedly adopted "by agreement with the USWA," the plaintiffs view the subsequent rescission as a breach of the company's agreement with a labor union in violation of the LMRA. The plaintiffs seek past benefits, damages, redress of fiduciary violations and a declaratory judgment that the LMRA does not prohibit the granting of the benefits at issue here.

Alternatively, plaintiffs argue that even if the leave policy did violate the LMRA, they are nonetheless entitled to relief on equitable grounds. They urge that they are not in *pari delicto* with USX, alleging that USX used the policy as a means of bribing a small number of union officials to agree to concessions in a contract negotiation. Accordingly, plaintiffs feel that USX should not be allowed to use its misdeed as a defense to this action.

I.

Because we are reviewing the district court's dismissal of the plaintiffs' complaint, we will take all well-pleaded allegations as true, permitting dismissal only if the plaintiff could not prove any set of facts upon which relief might be granted. *Conley v. Gibson*, 355 U.S. 41 (1957); *Rankow v. First Chicago Corp.*, 870 F.2d 356, 367-68 (7th Cir. 1989). As we have noted many times, the complaint merely serves to put the defendant on notice and is to be freely amended or constructively amended as the case develops, as long as amendments do not unfairly surprise or prejudice the defendant. *Ash v. Wallenmeyer*,

No. 88-1253, slip op. at 3-4 (7th Cir. July 13, 1989); *Walton v. Jennings Community Hosp.*, 875 F.2d 1317, 1320-21 n.3 (7th Cir. 1989). Clearly, if we can see at this early stage in the development of the case that there exists a material issue of fact that would render the case unsuitable for summary judgment later on, we would certainly refuse to permit dismissal. Similarly, just as we would draw inferences in favor of the nonmoving party in reviewing a grant of summary judgment, we give the plaintiffs the benefit of the doubt in reviewing the dismissal of their complaint. This is important as to several disputed issues of fact in this case.

The plaintiffs' version of the facts, as described in the complaint, is roughly as follows: Prior to 1984, USX (through United States Steel Corporation, a division of USX) allowed its employees to continue accruing pension-benefit rights while they were on leave of absence from active employment for a period of up to two years. This policy applied, for example, to leaves of absence taken by employees in order to work for the Union. In 1984 USX changed its leave of absence policy, permitting former employees to accrue pension credit until retirement, whether they remained in the company's employ or left to work for the union.¹ However, it imposed limits on this new policy:

¹ Specifically, the policy read:

A leave of absence shall be granted for the period between the date on which the employee left active employment with the United States Steel Corporation and the earliest of (i) the date of retirement from United States Steel Corporation, or (ii) the date employment with the United Steelworkers of America International Union terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided

(Footnote continued on following page)

such leave of absence shall be granted only to employees of United States Steel Corporation's current steel producing operations . . . who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union, (b) from the time of cessation of active employment until February 29, 1984 shall have continued in the active employment of the International Union and (c) shall continuously have held positions servicing bargaining units at the U.S. Steel Division in which [they] had been employed.

Complaint, Ex. A. Although this new policy was approved by the company in October of 1984, effective as of February 29, 1984, USX failed to inform the Union of its new policy until March 5, 1985; the *plaintiffs* were not informed about the existence of the policy until early 1987. (We note, however, that the company alleged at a meeting in September of 1987 that the new leave of absence policy was adopted by agreement with the Union—presumably meaning local representatives of the Union.) Prior to formally notifying the Union about the policy in 1985, USX approved benefits under the new policy for six Union employees, but has refused to apply the policy to any other applicants.² The complaint further alleges that USX has “waived in practice” any limits on its extended leave

¹ continued

with respect to such service shall be determined solely on the minimum formula of the rules

Complaint, Ex. A. Policies of this sort, permitting extended pension credit for employees that become union officials, have apparently been widespread in United States industry for decades. See *Communications Workers of Am. v. Bell Atl. Network Servs., Inc.*, 670 F. Supp. 416, 421 (D.D.C. 1987).

² There is one possible exception, mentioned in the complaint; a seventh USWA employee brought suit to collect benefits due under the terms of the new policy and was apparently granted them in return for settling the suit.

policy, because it has "granted benefits to others who did not qualify" under the stated conditions and has "engaged in arbitrary, discriminatory and disparate treatment of some plaintiffs, in violation of its fiduciary duties under ERISA section 404." Complaint, ¶ 47.

Shortly after plaintiffs applied for benefits under the new policy, USX rescinded the policy, asserting that recent opinions from the Third and Second Circuits had made it clear that the policy violated the LMRA. As of April, 1987, USX adopted a new policy, permitting pension credit to accrue only during leaves of absence of one year, renewable for "a further period of one year at the discretion of the Company." Complaint, Ex. B. The new policy permitted longer leaves only on the approval of the Corporate Policy Committee. The Union subsequently refused to represent the plaintiffs in their quest for benefits under the old policy.

In briefs filed in the district court and in this court, the plaintiffs have asserted one possible interpretation of the facts alleged in their brief—that the change in leave policy, applied as it was to a limited number of union officials, and kept secret from the Union itself as well as its members—was in effect a bribe of those officials.³ The Union and USX make much of the fact that the "bribery scenario" was not itself spelled out in the complaint, but as we have noted above, notice pleading does not require that every possible interpretation of the facts be spelled out in the complaint. Nor are the plaintiffs required at this point to prove their allegations as they would be on a motion for summary judgment; our inquiry here is not whether the plaintiffs win but rather whether there is any

³ Plaintiffs point out in their brief that the company changed its leave policy shortly after the Union approved a new agreement whose terms were very favorable to the company—and that four of the six Union officials who were eventually given pension payments under the policy were the key Union negotiators of that agreement.

set of facts upon which the plaintiffs could *possibly* win. Thus, while we stress that the facts recited here have not been proved (and that the court of course does not take any position as to their ultimate truth), we will certainly consider, in connection with the motion to dismiss, the possibility that the facts here alleged amounted to a "sweetheart" deal. If under those facts the plaintiffs could conceivably prevail, then they should be permitted to continue past the motion to dismiss.

II.

We proceed to the central questions: Was USX's rescinded leave policy in fact in violation of the LMRA—and even if it was, could USX be barred from raising an "illegality" defense if the company was not *in pari delicto* by reason of participation in a bribery scheme?

A.

In rescinding its leave policy, the company took the position that any extended leave policy would violate the LMRA.⁴ At issue are two provisions of section 302. Subsection (a) generally prohibits payments by employers to union officials:

(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

⁴ The company cited two cases in reaching this conclusion—*BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union*, 791 F.2d 1046 (2d Cir. 1986), and *Trailway Lines v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir. 1986). While *Trailways* might support the company's conclusion, it is puzzling that the company cited *BASF Wyandotte*. In *BASF Wyandotte*, the Second Circuit held that "no-docking" provisions (authorizing pay for time spent on union business) did not violate section 302, a holding that, if anything, tends to support the notion that leave policies of the sort involved in this case might be legal under the LMRA.

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(1) to any representative of any of his employees who are employed in any industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce

29 U.S.C. § 186(a). However, subsection (c) lists exceptions to this general prohibition, including the exception at issue here:

(c) The provisions of this section shall not be applicable

(1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer

29 U.S.C. § 186(c). It is fairly universally acknowledged that a central purpose of section 302 as a whole was to prevent employers from bribing union officials. *See* 93 Cong. Rec. 4805 (1947) (statement of Senator Ball, an author of Senate amendment substantially adopted as section 302 in final statute) ("The sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes."); *see also* *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) ("members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers [and] with extortion by employee

representatives"); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050 (2d Cir 1986) (same); *Maxwell v. Lucky Constr. Co., Inc.*, 710 F.2d 1395, 1398 (9th Cir. 1983) ("congressional objective in enacting § 302 was to inhibit corrupt practices in the administration of employee welfare funds established through the collective bargaining process"); *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) ("dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers"). The exceptions listed in subsection (c) have been carefully drafted with an eye to this underlying goal.

The plaintiffs make a quite creditable "plain language" argument based upon the exception delineated in section 302(c)(1), which permits payments by an employer "to any officer or employee of a labor organization, who is also an employee or *former employee* of such employer, as compensation for, or *by reason of*, his service as an employee of such employer." (emphasis supplied). The plaintiffs are union officials who were once employed by USX. The new leave policy arguably provided extended leaves for former employees "by reason of" their earlier service, as can be seen in the company's stated basis for the new policy:

Under the [former] Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that

there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for USW.

Therefore, it is proposed that the Leave of Absence Policy be revised to permit granting leaves of absence beyond two years

Complaint, Ex. A. In adopting the policy, the company would arguably be providing for extended leave "by reason of" a former employee's earlier service, which rendered that employee familiar with the facilities and particular situations of specific company plants. Alternatively, as plaintiffs' brief argues, the policy could be viewed as "a 'good will' payment, in recognition of plaintiffs' past employment for USX, and its purpose is to compensate, or make whole. It is a true commercial payment" Brief of Plaintiffs-Appellants at 28. Of course, characterizing the payment as a "good will" payment brings it perilously close to the kind of payment Congress sought to prohibit in section 302—but at this stage of the proceedings we can grant the plaintiffs that payments of this sort, if given "by reason of" employees' former employment with the company and administered in an above-board, noncoercive manner, could fall within the plain language of the 302(c) exception.

In *Trailway Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir. 1986), the Third Circuit confronted a very similar "plain language" argument from the union in that case, but came up with a somewhat different reading of the language of 302(c)(1):

A logical reading of the statute makes clear that the "payments to former employees' exemption" of 302(c)(1) applies solely to payments made as "compensation for

or by reason of" the former employees['] *past* service to the employer. . . . Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company*. Just as clearly, however, . . . pension fund benefits paid on behalf of former employees serving as union officials while on leave from Trailways are not compensation for their *past* service to Trailways.

Id. at 106 (emphasis in original). *Trailways* involved a collective bargaining agreement provision requiring Trailways to contribute to a joint union-management pension trust fund for employees who took leaves of absence from the company to accept full-time union positions. In concluding that this arrangement did not fall under the 302(c)(1) exception, the Third Circuit took as obvious two propositions—first, that the word “services” in the statute really means “past services,” and second, that any compensation continuing beyond the time of an employee’s “past” employment could not be “by reason of” employment. The first proposition is fairly clearly correct; the statute speaks of compensating employees or former employees for “service as an employee of such employer.” In the case of a former employee, this service would have to have been completed “as an employee”—i.e., in the past, while he or she was still employed by the employer. The second proposition, however, does not follow in any obvious fashion from the “plain language” of the statutory phrase “by reason of.”

The district court in the case before us appears to have accepted the Third Circuit’s reading—and additionally found two further reasons why the leave plan in this case would not qualify under the section 302(c)(1) exception. First, the court attempted to distinguish a recent Second Circuit opinion, *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union*, 791 F.2d 1046 (2d Cir. 1986), which held that “no-docking” provisions fall under the section 302(c)(1) exception. “No-docking” provisions permit employees to spend time during the work-

day on union business without losing pay for those periods of time. The district court viewed "no-docking" provisions as different from the leave provision at issue here because payments to employees under the "no-docking" principle benefit *current* employees. *Toth v. USX Corp.*, 693 F. Supp. 693, 698 (N.D. Ill. 1988) ("the § 302(c)(1) exemption applies to payments made to, or on behalf of, present employees of the paying company"). However, as we have noted, section 302(c)(1) on its face provides for payments to *former* employees, so that this distinction does not seem sufficient to distinguish the "no-docking" cases.⁵ Thus the fact that USX's leave policy applies to former employees does not mean that section 302(c)(1) is inapplicable.

Second, the district court viewed as critical to its finding of illegality the discretionary nature of the leave plan in the case before us: "Unlike the plans at issue in *Trailways* or *Bell Atlantic*,⁶ participation in the USX extended leave program is completely discretionary." *Id.* at 698. Again we respectfully disagree with the reasoning of the district court, for whether or not the USX plan was discretionary is a disputed issue of fact not suitable for disposition at this stage in the case. The language of the plan itself is not discretionary at all; it states in mandatory language that leaves of absence "*shall*" be granted to employees who meet the delineated criteria. However the

⁵ The court in *Trailways* was also asked to decide the applicability of section 302(c)(5), an issue not raised in the case before us. The 302(c)(5) exception permits employers to make payments to pension funds for "employees", but unlike section 302(c)(1) does not specifically include "former employees" as well. The Third Circuit understandably concluded that the term "employees" in section 302(c)(5) meant *current* employees only. 785 F.2d at 106-08.

⁶ The court here refers to *Communications Workers of America v. Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416 (D.D.C. 1987), in which the District Court for the District of Columbia held that a long-term leave policy qualified under the section 302(c)(1) exception.

letter in which USX informed the Union about the changed leave policy characterized the leave policy as entirely discretionary:

. . . please be advised that, effective February 29, 1984, United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis. Pursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives

Plaintiffs' Memo. in Opp. to Motion to Dismiss, Ex. 2. What effect the language in the letter should have on the terms of the policy—and indeed the proper interpretation of the policy—are issues that are hotly disputed. We agree with the district court that plans that are entirely discretionary would be difficult to exempt from the general prohibition of section 302(a), precisely because they would afford too large an opening for precisely the kind of seduction of union representatives that section 302 was designed to avoid. A reading of the phrase “by reason of” that would permit such entirely discretionary plans might permit the exception to swallow the rule. But we do not reach the difficult question of how much discretion in the employer is permissible under section 302, because it is not open to us to decide on disputed issues at this stage—and because other issues determine the outcome here.

We are left, then, to consider the reasoning of the Third Circuit as adopted by the district court. The Third Circuit ruled that “the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company*” and that “pension fund benefits paid on behalf of former employees serving as union officials while on leave from Trailways [clearly] are not compensation for their past service to Trailways.” 785 F.2d at 106 (empha-

sis in original).⁷ Granting that the word "services" in section 302(c)(1) signifies "past services" only, there remains a further question why compensation continuing beyond the time of an employee's "past" employment could not still be "by reason of" that past employment. We cannot find any signal in the text itself, nor in the legislative history of the text, to justify the Third Circuit's restrictive reading of the language of section 302(c)(1).⁸ Indeed,

⁷ The Third Circuit further noted that in the particular plan at issue in that case, pension fund contributions on behalf of former employees were measured by their current union salaries rather than by any past position with the company. 785 F.2d at 106 n.5. This is a somewhat different point, for it would obviously be possible to have continuing pension contributions for former employees that were measured by past positions with the company. See, e.g., *Bell Atlantic*, 670 F. Supp. at 422. But the reasoning in *Trailways* would seem to bar even continuing pension contributions measured by past wages: "Since it is undisputed that the individuals involved perform no present services for Trailways for which they could be compensated while on leave to serve the Union, . . . it is [] evident that the contributions to the pension fund are not in compensation for, or by reason of, the employees' current service to Trailways." 785 F.2d at 106 n.5. Thus, *Trailways* reads an extra provision into the language of section 302(c)(1), assuming that payments made as "compensation for or by reason of" past services cannot be made after the time those services cease. This is clearly not a "plain language" reading of the statute.

⁸ Although it is not directly on point, our recent opinion in *Tyson v. International Brotherhood of Teamsters, Local 710* lends strong support to the proposition that retroactive payments can properly be deemed compensation for earlier service, even where they are not straightforward wages for labor. 811 F.2d 1145, 1147 (7th Cir. 1987) (under terms of collective bargaining and trust agreements, employee is "entitled to pension credit for certain hours that he does not actually work, even if, as here, he is paid for those hours after he has ceased to be employed"). *Tyson* further notes that severance pay, or payments to disabled employees, may properly be deemed "payments made in recognition of long years of work"—presumably, then, these payments would be made "by reason of" former employment.

The one statement specifically discussing subsection (c)(1) made by Senator Ball, an author of section 302, does not give much en-

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inclusion of the term "former employee" within the section would seem to indicate, to the contrary, that payments could be made at any time after employment ceased, as long as they were given "as compensation for, or by reason of" the earlier service. However, given the overall purpose of section 302 (to prevent bribery), we may not construe the phrase "as compensation for, or by reason of" too broadly. We are left with a tension between the general prohibition of section 302(a), with its clear goal of preventing bribery, and the specific exception of section 302(c)(1), permitting payments to former employees as long as those payments are in some way motivated by past services.

One obvious instance in which continuing payments constitute recompense for past services is when those continuing payments were bargained for and formed part of a collective bargaining agreement. As Judge Becker remarked in dissent in *Trailways*, all of the terms of employment for which unions bargain are properly deemed part of the compensation for which employees work. 785 F.2d at 109. This is also a point stressed by Judge Gasch of the United States District Court, District of Columbia, who in *Communications Workers of America v. Bell Atlantic Network Services, Inc.* ruled that benefits granted employees who were on union leaves (for up to eighteen years) were acceptable under the section 302(c)(1) exception. 670 F. Supp. 416, 419 (D.D.C. 1987) ("Each collective bargaining agreement that includes a union leave benefits provision reflects the fact that, in consideration

* continued

lightenment: "The first [exception] is with respect to any money due a representative who is an employee or a former employee of the employer, on account of wages actually earned by him." 93 Cong. Rec. 4806 (1947). We are still left here to construe the words "on account of," which pose much the same difficulty as is posed by the words "by reason of." Obviously, where there is little guidance from the legislative history, we concentrate upon construing the language of the statute rather than that of the legislative history.

for work performed, all employees have received the opportunity to take union leave without the loss of certain benefits.'"); see also *BASF Wyandotte Corp.*, 791 F.2d at 1049. Employees might accept lower wages now in return for future benefits; the work they subsequently perform is as surely performed in order to earn those future benefits as it is to earn current wages. In those cases future benefits would be "in compensation for" or "by reason of" past employment. Thus, collective bargaining and inclusion in a generally disseminated collective bargaining agreement, whose terms are uniformly applicable and nondiscriminatory, are crucial. In addition, requiring that such compensation be openly bargained for and included in a collective bargaining agreement is one way in which to guard against use of retroactive payments to bribe union officials. And, if inclusion in a collective bargaining agreement is required, the officials would have to answer to the rank-and-file about any term of the agreement aimed at compensating the officials.

If retroactive payments were openly bargained for, labor and management would also be permitted to arrive at a mutually satisfactory solution to the problem of pensions and pension credit for employees who typically move back and forth between work for the company and work for the unions. This would accord well with observations contained in the legislative history of the LMRA, which demonstrate that Congress was attempting to permit labor and management some leeway in negotiating joint solutions to such problems while guarding against potential collusion between employers and corrupt union officials. One example is the struggle over how to handle employer aid to union welfare funds. This was completely banned in the original version of the bill. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 29 (1947) [House Report]; S. Rep. No. 105, 80th Cong., 1st Sess. 426-30 (1947) [Senate Report] (containing no exception for welfare funds). The minority report from the House stressed the undesirable nature of a complete ban:

Provisions which deny employees and organizations the opportunity to make voluntary provisions against illness and insecurity can only increase reliance upon the State. In the interest of sound governmental policy such dependence upon the State should be checked by encouraging the formulation and adoption, through voluntary agreement, of plans that will aid citizens during periods of misfortune or economic distress. Legal prohibitions against such arrangements increase the responsibility of the Federal Government to its citizens in periods of distress.

House Report [Minority Report] at 79. In the Senate, a number of senators, including Senators Ball and Taft, issued Supplemental Views stating their intention to propose a number of amendments—including one that was eventually to become section 302. Senate Report [Supplemental Views] at 458-59; *see also* 94 Cong. Rec. 4754 (Senate adopts amendment); H.R. Rep. 510, 80th Cong., 1st Sess. 24-25 (Conference Committee accepts amendment). The authors of the Supplemental Views stated that their proposal “does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered” and reiterated their aim of safeguarding union members’ money, rendering union officials strictly accountable for the use of that money and preventing “extortion”. *Id.* Their approach demonstrates the balancing of interests in the course of solving the problem; funds were to be permitted not banned, but safeguards were put in place to ensure that union members’ interests were sufficiently protected.* A similar balance can be achieved

* See section 302(c)(5), which provides:

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their

(Footnote continued on following page)

under the provisions of section 302(c)(1) by permitting unions and employers to work out a joint solution to the pension credit problem while still requiring accountability to the membership and a firm connection between credit given and the terms of prior employment.

At some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302—if, for example, the terms of compensation for former employment were clearly so incommensurate with that for former employment as not to qualify as payments “in compensation for or by reason of” that employment, or if the terms vested so much discretion in the employer that the potential for undue influence created a clear 302(a) violation. See *BASF Wyandotte*, 791 F.2d at 1050 (“we do not suggest that [section 302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work . . . this would be precisely the kind of device that §§ 302(a) and (b) were designed to prevent”; fulltime pay for no service cannot reasonably be said to be compensation “by reason of” service as an employee). But policies that simply provide continuing pension credit for union members such as those involved in the case before us, or in *Trailways*, do not by themselves constitute such dangerously imbalanced bargains.

* *continued*

families and dependents, for medical and hospital care, pensions on retirement or death of employees . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, . . . and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities

As the Second Circuit noted in *BASF Wyandotte*, 791 F.2d at 1051-53, the legislative history of a related provision of the NLRA (and of subsequent amendments) exhibits a similar attempt to prevent corruption while still permitting unions and companies some freedom to jointly solve shared problems.

Nonetheless, the company's policy in the case before us cannot qualify as "compensation for or by reason of" former employment because, unlike the policy in *Trailways*, USX's leave policy was not a part of the bargained-for collective bargaining agreement.¹⁰ It was a unilateral change—under the plaintiffs' own allegations, a bribe. That the change here was at least conducive to or suggestive of bribery (whatever the merits of the bribery contentions) should indicate why it is not suitable for exemption from the general section 302 prohibition on gifts or loans from employers. Allowing more former employees to "get in" on the bribe would hardly further the purposes of section 302. The proper remedy for the situation if bribery was indeed involved is prosecution of the company and union officials at fault, not judicial approval of the bribery scheme. *Cf. Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). We note additionally that, of course, if the company felt that its policy violated the LMRA, it should also have recognized that any further payments of any kind under the policy would be illegal—including those to the six or seven former employees to whom the company saw fit to extend this special benefit.

We note an additional problem with the arrangement in this case; the new policy was instituted retroactively (another potential distinction between the case before us and *Trailways*). Although section 302 does not by its terms forbid retroactive *payments* in consideration for former service, it is not clear whether retroactive institution of new terms of employment would be permissible under section 302. The problem, of course, is that if a new pension policy is negotiated after a former employee has broken service, it is not obvious that the new policy is compensation for prior service. On the other hand, it may still be "by reason of" prior service within the terms of the statute. *See Bell Atlantic*, 670 F. Supp. at 419-20. We

¹⁰ Because of this crucial distinction, the case before us is distinguishable from *Trailways* and our holding therefore does not directly conflict with that of the Third Circuit.

do not reach this issue; it suffices for our purposes that the policy in this case was not part of a collective bargaining agreement. We leave to another day the question whether retroactive bargaining is permissible.

B.

Plaintiffs argue alternatively that even if the leave policy in this case violated the LMRA, we should enforce it because USX is not *in pari delicto*. Essentially, the plaintiffs contend that the new leave policy was instituted in order to bribe union officials to make concessions when bargaining with the company; thus the company should not be permitted to raise illegality of the contract as a defense here, particularly in light of the fact that the plaintiffs were wholly innocent of any misdeeds.

However, as the district court pointed out, we have firm guidance from the Supreme Court on this issue. In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the defendant corporation attempted to raise an illegality defense when trustees of a union pension fund sued for payments due under the terms of the collective bargaining agreement. The defendant argued that the specific contractual provision upon which the trustees relied was illegal both under the National Labor Relations Act ("NLRA") and the Sherman Act. The United States Court of Appeals for the District of Columbia Circuit refused to allow the illegality defense on a number of grounds, including "considerations of equity and relative fault." *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1311 (D.C. Cir. 1980). The Court of Appeals specifically invoked the *in pari delicto* doctrine, noting that the trustees in that case served as representatives of "persons wholly innocent of wrongdoing." *Id.* The appellate court also considered "the overall scheme of national labor policy" in refusing to permit an illegality defense based upon the NLRA. The Supreme Court rejected the reasoning of the appellate court and held that the federal courts could not enforce promises that themselves violated the labor or antitrust laws. 455 U.S. at 82-83.

It may be, as plaintiffs argue, that *Kaiser* has not entirely foreclosed an *in pari delicto* argument under some circumstances. See *id.* at 81-83 & n.7. But the situation in this case is directly analogous to that in *Kaiser*, and if wholly innocent pension trustees were not entitled to enforcement of a contract that arguably violated the NLRA, neither can plaintiffs in the case before us require enforcement of a company leave policy that violates the LMRA. As we have noted, enforcing an illegal promise in order to benefit third parties is not an appropriate way of punishing any wrongdoing that may have occurred.

III.

The leave policy at issue here was illegal, not because it provided for a long term arrangement, but because it was not properly bargained for and included as a term of the collective bargaining agreement between the company and the Union. Because the plaintiffs cannot avail themselves of an *in pari delicto* argument in this case, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

APPENDIX B

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

ANDREW TOTH, *et al.*,

Plaintiffs,

v.

USX CORPORATION, and UNITED
STEELWORKERS OF AMERICA,
AFL-CIO-CLC,

Defendants.

No. 88 C 2135

Honorable
Nicholas J. Bua
Presiding

MEMORANDUM ORDER

Defendant USX Corporation ("USX") and Defendant United Steelworkers of America, AFL-CIO-CLC ("USWA") move this court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaint. For the reasons stated herein, USX and USWA's motions are granted, and plaintiffs' complaint is dismissed in its entirety.

1. FACTS

Plaintiffs are 15 USWA staff representatives who were active employees of USX prior to joining the union staff on a full-time basis. Each began his employment with USX 30 or more years ago and at various times prior to October 1977 left to become full-time USWA staff representatives.¹ Prior to February 24, 1984, USX permitted its employees to leave USX for a period of up to two years to assume full-time work with USWA without requiring the employees to incur a break in service. While on such a leave of absence, union representatives accrue pension benefit rights as if they were working for USX. At the end of the two-year period, union representatives declining to resume employment with USX suffer a break in service which adversely affects their rights under the USX pension program.

On February 24, 1984, USX changed its leave of absence policy. Under the revised policy, USX extended the leave of absence period and permitted qualifying persons to remain on such leave until they retired from either USX or USWA. Union representatives that previously worked at a current USX steel producing facility and left prior to January 1, 1979 to assume full-time union positions servicing bargaining units with which they had been associated during their tenure with USX were eligible to apply. If selected to participate in the extended leave plan by USX, such union representatives would receive retroactive service credit as well as future service credit for the duration of their union employment. The plan revision makes clear that service credit attained under the extended leave program "shall be determined solely on the minimum formula" under the rules of governing the relevant pension plan.

¹Union records reveal that plaintiff Harry Piasecki left USX on September 24, 1977 to begin full-time employment with USWA. Piasecki was the last of the 15 plaintiffs to depart from USX to assume a full-time position as a USWA staff representative.

Over a year after adopting the extended leave policy, USX forwarded USWA President Lynn Williams a letter announcing the change. Oddly, the letter, dated March 5, 1985, notes that six union representatives had already applied and were accepted under the revised program. Williams, however, failed to relay this information to plaintiffs or other eligible union representatives. As of February 1987, the only applicants or participants in the revised program were the six union officials to which reference is made in USX's March 5, 1985 letter.

In early 1987, plaintiffs discovered for the first time that a revised leave of absence policy existed and that they might be eligible to receive pension benefits under it. Beginning in March 1987 and continuing to the time the instant case was filed, plaintiffs submitted applications to USX for participation in the new leave of absence program. All such applications, however, were denied. By letter dated April 28, 1987, USX informed Williams that the extended leave of absence program was being terminated because recent appellate decisions indicated such long-term leave of absence plans violated § 302 of the Labor Management Relations Act. Rescission of the policy, the letter explained, was simply intended to conform USX's practice with the current status of the law. The letter indicated that although all pending applications for participation in the revised program were being denied, "leaves of absence which previously had been granted pursuant to such policy" were not being rescinded. On May 14, 1987, USX formally amended its leave of absence policy abolishing the terms of the 1984 revision. The amendment was made effective April 1, 1987.

Suffering this denial, plaintiffs approached USWA officials for help in securing benefits provided under the 1984 plan. After a series of meetings, plaintiffs were informed that USWA would not represent them in their quest for additional pension benefits from USX. Plaintiffs responded by filing the instant action.

II. DISCUSSION

In Counts I-V of their complaints, plaintiffs assert a variety of claims under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, seeking monetary and equitable relief from USX. Each of plaintiffs' claims against USX is premised on the adoption or revocation of the extended leave program. In Count VI, plaintiffs seek damages from USWA for lost pension benefits as well as costs and fees incurred in litigating the present case. Plaintiffs' claims against the USWA are based on the theory that USWA breached its duty of fair representation by failing to promptly disclose information concerning the 1984 revisions to USX's leave of absence program and refusing to represent plaintiffs in their efforts to secure benefits thereunder.

USX moves to dismiss Counts I-V on the ground that the revised leave of absence program upon which plaintiffs' claims rest is unlawful under § 302 of the LMRA, 29 U.S.C. § 186. USWA moves to dismiss Count VI on the basis that it owes no duty of fair representation to individuals such as plaintiffs who left the bargaining unit for which USWA functions as an exclusive bargaining representative. Defendants' motions will be addressed in turn.

A. USX's Motion to Dismiss

Section 302(A) of the LMRA, 29 U.S.C. § 186(a), provides in relevant part:

It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would

admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

Section 302(b) of the LMRA, 29 U.S.C. § 186(b), contains reciprocal provisions prohibiting labor organizations and their officers or employees from requesting, receiving, or agreeing to receive or "accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." The prohibitions contained in §§ 302(a) and (b) are aimed at preserving the integrity of the collective bargaining process by preventing employers from tampering with the loyalty of union officials and union officials from "shaking down" employers. *Arroyo v. United States*, 359 U.S. 419, 425-26, nn. 7-8 (1959).

Section 302(c) of the LMRA, 29 U.S.C. § 186(c), contains a number of exceptions to the prohibitions outlined in §§ 302(a) and (b). One such exception, found in § 302(c)(1), reads as follows:

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer.

It is around the foregoing exception that the central dispute between plaintiffs and USX exists. Plaintiffs, although recognizing the revised leave program entails a transfer of "money on other things of value" to union representatives in the form of increased pension payments, contend that the § 302(c)(1) exception applies to the leave policy at issue. USX asserts that it does not.

Recently, courts analyzing similar extended leave policies under § 302 have reached conflicting results. *See Trail-*

ways Lines, Inc. v. Trailways, Inc., Joint Council, 785 F.2d 101 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 403 (1986); *Communications Workers of America v. Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416 (D.D.C. 1987). In *Trailways*, the Third Circuit invalidated a portion of a collective bargaining agreement providing for payment of certain fringe benefits to individuals who took indefinite leaves to assume full-time union positions. The plan in *Trailways* permitted leave employees to accumulate service credit toward their company pensions as well as continue participation in the firm's group insurance plan while working as full-time union representatives. *Trailways*, 785 F.2d at 103. The parties' collective bargaining agreement specified that pension fund contributions made by the employer under the program were to be calculated on the basis of the salary being paid to the participating union representative. *Id.* at 106. After the employer discontinued pension payments under the leave plan, the union sued, arguing that the company had breached the terms of the collective bargaining agreement.

The *Trailways* court, however, rejected the union's claims and held that the payments required under the leave plan violated § 302. The court observed that according to the plain language of § 302(c)(1), payments to former employees are permissible only if they are "in compensation for, or by reason of, *his service as an employee of such employer.*" *Id.* at 105 (emphasis added). The court reasoned that a proper reading of § 302(c)(1) makes clear that the exemption for payments to former employees applies only to payments made in compensation for or reason of the former employees' *past* service to the employer. *Id.* at 106. Presumably, payments contemplated by this exception encompass pension and other benefits paid to retired employees of an employer who later assume union positions. The court ruled that the scope of permissible payments under § 302(c)(1) is limited to compensation for contemporaneous service to the employer. *Id.* Since such service could only be performed

by a current employee of the employer and union representatives on leave from their company jobs cannot be viewed as current employees of the contributing employer, the court held that pension payments on behalf of former employees who assumed full-time union positions were not protected by the § 302(c)(1) exemption. In reaching this conclusion, the court observed:

Pension fund contributions made on behalf of union officials on leave from Trailways are tantamount to direct compensation paid to its employees or payments to the union. While payments made on behalf of Union officials who were once active employees of the employer but who may never return to his employ may not at first blush be the kinds of payment thought to lead to corruption of union officials, the potential for such corruption, or at least the appearance of it, nevertheless remains.

Id. at 108 (citations omitted).

An opposite result under § 302(c)(1) was reached in *Communications Workers of America v. Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416 (D.D.C. 1987). Like *Trailways*, the dispute focused on the terms of a leave of absence provision in a collective bargaining agreement. The leave plan in *Bell Atlantic* provided union officials on leave from their employment with the utility certain fringe benefits for a period of up to 18 years of union service. After highlighting a number of differences existing between the plan in *Trailways* and the one before it,² the court concluded that *Trailways* was distinguishable. *Id.* at 422-23. Under the plan at issue in *Bell Atlantic*, the court was unable to detect any possibility

²The *Bell Atlantic* court noted the following differences: (1) the Trailways pension fund was jointly administered by labor and management while the Bell Atlantic plan was employer administered; (2) pension fund contributions by Trailways were based on the current salaries earned by the participating union officers where pension payments by Bell Atlantic were calculated on the salaries last received by the union representatives as a company employee; and (3) all Trailways employees accepting full-time employment with the union automatically received leaves of indefinite duration while leaves provided by Bell Atlantic could not exceed 18 years and could be denied to employees whose services were needed by the company.

of bribery or extortion. However, the court believed that features in the *Trailways* plan presented a greater risk of the potential abuses § 302 was designed to prevent. *Id.* at 423.

Refusing to find *Trailways* applicable, the court turned to its own analysis of § 302(c)(1). Significance was attached to the fact that § 302(c)(1) distinguished between payments to former employees "as compensation for" their service as employees and payments made "by reason of" such services. *Id.* at 419-20. Viewing cases upholding the validity of "no-docking" provisions in collective bargaining agreements,³ the court noted that important similarities existed. *Id.* at 422-23. "No-docking" provisions allow union officers who are full-time company employees to take time off from work, with pay, to conduct union business. The court observed that payments to union officials under "no-docking" provisions and payments made pursuant to extended leave programs are essentially identical in nature. *Id.* at 423. In neither case does the person perform services for the employer during the time for which compensation is furnished. *Id.* Instead, the compensated party actively engages in service for the union. *Id.* The amount of time spent on union work was the only difference the court could discern between the two types of provisions. *Id.* The court emphasized that decisions sustaining the validity of "no-docking" clauses were based on the § 302(c)(1) exemption for payments made "by reason of" services provided as an employee of the employer. *Id.* Unable to find any significant distinction between the type of services afforded employers under both types of programs, the court concluded that fringe benefits provided to leave employees who assumed full-time union positions were § 302(c)(1) payments to former employees "by reason

³In analyzing the leave program's validity under § 302(c)(1), the *Bell Atlantic* court extensively reviewed the Second Circuit's decision in *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046 (2d Cir. 1986), and noted the Fifth Circuit's decision in *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986).

of" their past service as Bell Atlantic employees. *Id.* at 423-24.

Although this court agrees that little meaningful difference can be found between the nature of services provided employers in exchange for payments required under "no-docking" provisions and extended leave agreements, this court is unable to ignore § 302(c)(1)'s language requiring that the compensated individual be an actual employee of the employer. As emphasized by the Second Circuit in addressing the permissibility of "no-docking" provisions, "§ 302(c)(1) is appropriately interpreted by focusing not on whether the activities to be engaged in during the pay period directly benefit the employer but on whether they are to be engaged in by one who is a bona fide employee of the payor." *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986). The central distinction between "no-docking clauses" and extended leave provisions lies in the fact that payments made under the latter are made to persons who are not employees of the company providing compensation. *Trailways*, 785 F.2d at 106-07. Simply stated, the § 302(c)(1) exemption only applies to payments made to, or on behalf of, present employees of the paying company. *Id.*

In its struggle to meet this requirement, *Bell Atlantic* seems to assert that since many union representatives often return to their former jobs with the company, compensation is permissible by reason of their future service as future employees of the employer. *Bell Atlantic*, 670 F.Supp. at 423. Although ambitious, nothing in § 302(c)(1) or its legislative history supports such a construction. Rather, the plain language of § 302(c)(1) only permits payments to current employees of the employer. *BASF*, 791 F.2d at 1049; *Trailways*, 785 F.2d at 106-07. As such, this court is unable to follow the decision in *Bell Atlantic*.

Aside from the conclusions reached in *Trailways* and *BASF*, a second and perhaps more compelling reason exists

for invalidating the present leave of absence plan under S302. The leave policy, as revised in 1984, vests USX with exclusive authority to determine which union representatives will be accorded service credit toward their USX pensions. Unlike the plans at issue in *Trailways* or *Bell Atlantic*, participation in the USX extended leave program is completely discretionary. Although the 1984 leave plan sets forth specific requirements for determining applicant eligibility, USX retains absolute control over which union representatives on leave from USX will be allowed to participate in the plan.

Not only is the potential for bribery and abuse under such a plan evident, plaintiffs argue in their response briefs that the 1984 plan was adopted for the sole purpose of bribing certain union officials in charge of negotiating a labor agreement for a planned USX plant in Fairfield, Alabama. Plaintiffs assert that to induce union negotiators to accept substantial labor concessions in the Fairfield contract, USX proposed changing its leave of absence program to allow the negotiators to receive greater pension benefits. To ensure that the benefits were only made available to certain union officials, plaintiffs assert that the revised leave plan was not included in the Fairfield collective bargaining agreement, but instead was quietly adopted as part of a change in "corporate policy." Plaintiffs further claim that the rather unusual requirements for participation in the leave program as well as the discretionary nature of the plan existed so that only the Fairfield negotiators would receive the extended pension benefits. According to plaintiffs, this explains why six union representatives were already enrolled in the plan when USX first advised the union's president of the change in the leave policy some twelve months after its adoption. Plaintiffs assert that only after the plan was accidentally discovered by other union representatives in March 1987, triggering a wave of extended leave applications, did USX rescind its extended leave policy on the basis of a Third Circuit case decided more than a year earlier.

Although plaintiffs' assertions pose serious questions concerning potential criminal violations by certain USX and USWA personnel, plaintiffs' allegations of bribery coupled with the unbridled power of USX to pick and choose which union representatives would be accepted in the extended leave plan foreclose any possibility that the revised policy could be permissible under § 302. Not only does the plan fail to comply with § 302(c)(1)'s restriction that recipients of "things of value" be actual employees of the paying employer, the plan is allegedly designed to corrupt union negotiators. Even ignoring plaintiffs' contentions of actual bribery, the exclusive control reserved by USX to select participants from pools of eligible applicants presents an intolerable risk that the extended leave plan will be used as an instrument of corruption. Given the holding in *Trailways* and the nature of the challenged plan, this court is compelled to find that the extended leave plan adopted by USX in 1984 violates § 302 and is therefore unenforceable.

Plaintiffs assert that even if the leave policy violates § 302's restrictions on payments to union representatives, equity dictates that USX be required to pay pension benefits on plaintiffs' behalf as a penalty for using the leave program to bribe the Fairfield negotiators. This argument fails for two reasons. Although plaintiffs assert they are innocent third parties and are not *in pari delicto* with USX, participation in the leave program was discretionary. Even if this court were to give effect to the invalid leave provision as a "penalty" against USX, plaintiffs are unable to demonstrate they ever possessed an absolute right to participate in the program. Courts enforcing contracts deemed illegal under the theory that one side is not *in pari delicto* with the other do not rewrite the terms of the unlawful agreement to ensure that the less culpable party obtains recovery. Moreover, because members of the union employed at the Fairfield plant, rather than union representatives, would suffer any injury resulting

from the alleged bribery scheme, difficulty exists in identifying the damages allegedly caused to plaintiffs.

Second, federal courts do not sit to enforce promises or agreements deemed illegal under the federal labor laws. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). In *Kaiser*, a union fund trustee sought to enforce certain terms of a collective bargaining requiring the employer to make union fund contributions which violated § 8(e) of the NLRA, 29 U.S.C. § 158(e), the "hot cargo" provision of the Act. *Id.* at 76. Reversing the circuit court's affirmance of a judgment compelling the employer to make the challenged payments the Supreme Court declared that provisions in collective bargaining agreements that violate the labor laws are unenforceable. *Id.* at 77, 86. To hold otherwise, the Court observed, would command unlawful conduct which is impermissible in the federal courts. In coming to its holding, the Court stated as follows:

There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by federal law.

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it . . . To permit a recovery in this case is in substance to enforce an illegal contract . . . The Court refuses to enforce such a contract and it permits defendants to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest.

Id. at 77.

Plaintiffs do not present nor is this court able to detect any public interest which is served by enforcing the terms of the unlawful leave program. Quite to the contrary, the public

interest is best served by refusing to enforce plans designed to promote corruption in the collective bargaining process. As this court is unable to accept plaintiffs' equitable arguments for recovery and the revised leave plan under which plaintiffs seek pension benefits is illegal under § 302, this court is compelled to grant USX's motion to dismiss counts I-V of plaintiffs' complaint.

B. USWA's Motion to Dismiss

Plaintiffs' remaining claim in Count VI is directed solely at USWA. Plaintiffs contend that USWA breached its statutory duty to fairly represent them by failing to provide prompt notice of the revised leave plan and failing to pursue USX for benefits allegedly due plaintiffs under the revised leave plan. Plaintiffs' assertions rest on the theory that as employees on leave from USX, they remained part of the bargaining unit to which USWA owed a duty of fair representation.

The law has long been settled that a union owes a statutory duty of fair representation only to those employees for whom the union serves as exclusive representative. *Schneider Moving & Storage v. Robbin*, 466 U.S. 364, 376 n.22 (1984); *Vaca v. Sipes*, 386 U.S. 171, 177, 180 (1967). As the Seventh Circuit observed in *Freeman v. Local Union No. 135*, 746 F.2d 1316, 1320-21 (7th Cir. 1984):

A union's statutory duty of fair representation is coextensive with its authority under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), to act as the exclusive representative of the collective bargaining unit. [Citations omitted.] The scope of the duty of fair representation, however, extends no further. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation.

Thus, the very logic on which the duty of fair representation is based establishes its limiting principle: a duty is only owed

to those for whom a union acts as the exclusive bargaining representative, and even then only as to matters which fall within the union's exclusive control. If persons are free to pursue their interests on their own, *i.e.*, are not subordinated to the union's exclusive control, "the rationale for the duty of fair representation evaporate[s]," and the union owes them no duty of fair representation. *Freeman*, 746 F.2d at 1321.

Retired employees lose their status as bargaining unit members and are outside the union's exclusive representation authority. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 180 n.20 (1971). As such, the union is under no statutory duty to represent them. *Id.*; *Central States Pension Fund v. Central Transport*, 472 U.S. 559 (1985).

Similarly, union employees assuming supervisory positions depart from the bargaining unit represented by the union and are no longer owed a duty of fair representation. *Merk v. Jewel Food Stores*, ___ F.2d ___, 128 LRRM 2608 (7th Cir. May 31, 1988); *McTighe v. Mechanics Educ. Society*, 772 F.2d 210 (6th Cir. 1985); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981). As noted by the Seventh Circuit in *Merk*: "The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them 'fairly.'" *Merk*, 128 LRRM at 2612-13.

USWA argues that application of the foregoing authority conclusively establishes that no duty of fair representation was owed plaintiffs. The union notes that under the plan existing at the time each plaintiff left USX to become USWA representatives, leaves of up to two years were permitted for full-time union work. Failure to return to USX before expiration of the two-year period resulted in a break in service. Under this system, the last plaintiff to leave USX broke service in early October 1979. USWA thus contends that almost four and a half years before the revised leave plan took effect, plaintiffs were ex-employees of USX and ex-

members of the bargaining unit exclusively represented by USWA. Like retirees or those assuming nonunionized management positions, USWA argues that once plaintiffs terminated their employment relationship with USX, USWA's role as exclusive bargaining representative ceased and duty to fairly represent ended. As such, USWA contends that it owes plaintiffs no duty of fair representation.

Plaintiffs respond to USWA's contentions by asserting that the 1984 revised plan effectively reinstated them as employees of USX "on leave." Plaintiffs observe that employees on a leave of absence are presumed employees unless objective evidence exists that the employment relationship has been terminated. *See Valley Rock Prod., Inc. v. NLRB*, 590 F.2d 300, 303-04 (9th Cir. 1979). Because USWA has presented no objective evidence that the employment relationship between USX and plaintiffs ended, plaintiffs assert this court must assume that their employee status continued.

Courts interpreting the meaning of "employee" under § 9 of the NLRA for the purpose of determining voter eligibility in union certification elections focus on whether the questioned individual possesses a "reasonable expectation of employment." *Montgomery Ward & Co. v. NLRB*, 668 F.2d 291, 298 (7th Cir. 1981); *Choc-Ola Bottlers, Inc. v. NLRB*, 478 F.2d 461, 464 (7th Cir. 1973). As explained in *Montgomery Ward*:

The "reasonable expectation of employment" standard includes two elements that must be satisfied: . . . a subjective element—the employee's intent or expectation—and an objective element—the reasonableness of the expectation.

Montgomery Ward, 668 F.2d at 298. Generally, an employee on a leave of absence is presumed to have requisite expectation of future employment. *Id.* at 299; *Trailmobile Division, Pullman, Inc. v. NLRB*, 379 F.2d 419, 423 (3d Cir. 1967). This presumption attaches for the duration of the leave but evaporates if the employee does not return to work after the

leave expires. See *Whiting Corp. v. NLRB*, 200 F.2d 43 (7th Cir. 1952) (employee on illness leave who failed to return to work abandoned his employment). Workers who quit or abandon their jobs lose their status as employees because they no longer have the requisite expectation of future employment. *Id.*; *Montgomery Ward*, 668 F.2d at 299. In the absence of special circumstances establishing a contrary intention, a person who fails to resume his job after termination of leave abandons his employment. See *Whiting Corp.*, *supra*.

This court believes the foregoing principles are relevant to the dispute at issue. Plaintiffs assert that their status as employees on leave was revived when the revised leave policy was adopted. Unfortunately, this assertion rests on the faulty assumption that plaintiffs possessed an absolute right to participate in the extended leave program. As earlier discussed, USX possessed exclusive control over which union representatives participated in the revised leave plan. As selection was purely at the discretion of USX and plaintiffs were never chosen as plan participants, plaintiffs cannot rely on the revised leave program to renew their status as employees on leave. Thus, plaintiffs' employment status must be analyzed in light of the leave policy in effect at the time each left USX for their USWA positions.

As previously noted by USWA, at the time each plaintiff left USX to assume a union position, leaves of no more than two years were available for full-time union work. The last plaintiff to leave USX did so in 1977 and broke service in early October 1979. At no time since leaving did any plaintiff attempt to return to his former position at USX. Thus, as of October 1979 all plaintiffs surrendered their status as employees on leave and lost the presumption of continued employment. Once the presumption is removed, the party asserting a person's continuing employee status carries the burden of establishing that the employee had a reasonable expectation of employment in the future. See *Montgomery Ward*, 668 F.2d at 300. Aside from the revised leave program,

plaintiffs assert no facts which may establish that they possessed an expectation they would return to USX as employees or that such an expectation would be reasonable. To the contrary, the facts, as pled by plaintiffs, strongly suggest that plaintiffs abandoned their positions with USX when they failed to resume their employment after their two-year leave expired. Because plaintiffs fail to plead facts upon which a reasonable expectation of future employment can be based, plaintiffs are unable to establish that they continued to be members of the bargaining unit exclusively represented by USWA. As with others who have departed from USX with no reasonable expectation of returning, plaintiffs, as former employees, are not owed any duty of fair representation by USWA.

Plaintiffs nevertheless contend that even if they were former employees, the USWA owes them a duty of fair representation because "the rights under the [leave] policy relate back at least to the time of their active employment." This argument is misguided. The Supreme Court has consistently reaffirmed the principle that since former employees are not within the bargaining unit, the union owes them no duty of fair representation. *UMWA Health & Ret. Funds v. Robinson*, 455 U.S. 562, 574-575 (1982) ("former members and their families may suffer from discrimination in collective-bargaining agreements because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent' ") (quoting *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20); *Central States Pension Fund v. Central Transport*, 472 U.S. 559 (1985) (union's duty does not extend to all fund participants but "is confined to current employees employed in the bargaining unit in which it has representation rights"). Unions are not required to enforce the pension rights of former employees, even though such rights were earned during a time when the employees were in the bargaining unit and represented by the union.

Next, plaintiffs argue that even if the union had no duty to represent them, "it could voluntarily undertake such representation," and once having volunteered, would be governed by the duty of fair representation. First, even if a union volunteers to represent a person outside the bargaining unit, it is not bound by the statutory duty of fair representation. *International Union, United Auto Workers v. Yard-Man*, 716 F.2d 1475 (6th Cir. 1983). Second, plaintiffs' complaint is devoid of any allegation that USWA volunteered to represent plaintiffs. Instead, the complaint attacks the union because it would not represent plaintiffs. Although plaintiffs point to a letter sent by USWA President Williams to USX in response to the revocation of the extended leave plan, the letter does not contain any language indicating that USWA is pursuing extended pension benefits on plaintiffs' behalf. The document at issue simply informs USX that the USWA will enforce all leave rights established in the agreements it negotiates—the two-year leave policy which appears in the current USWA-USX collective bargaining agreement. Moreover, the letter makes quite clear that the 1984 revised policy was USX's unilateral creation and thus not within its scope of responsibility.

Finally, plaintiffs argue that since the union "induced" them to leave their jobs at USX and forego earning additional USX pension benefits, USWA acquired a duty to represent plaintiffs in seeking pensions from their former employer. This argument, however, suffers from several deficiencies. Aside from the fact no authority exists for such a proposition, plaintiffs' complaint contains no trace of an allegation that USWA compelled plaintiffs to give up their employment with USX. Moreover, plaintiffs nowhere assert that USWA prevented them from returning to USX prior to expiration of their two-year leave. From all indications, plaintiffs on their own accord chose to leave USX, to accept employment with USWA, and to remain after termination of their two-year leave of absence knowing that their employment relationship

with USX would thereby be severed. Because plaintiffs are unable to establish that USWA owed them a duty of fair representation, plaintiffs' claims against USWA fail, and Count VI of plaintiffs' complaint is dismissed.

III. CONCLUSION

For the foregoing reasons, the motions of USX and USWA are granted, and plaintiff's complaint is dismissed in its entirety.

IT IS SO ORDERED.

NICHOLAS J. BUA
Judge, United States District Court

Dated: September 1, 1988

